UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT and the GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT *Plaintiffs,* v. MARGARET SPELLINGS, in her official capacity as SECRETARY OF EDUCATION, *Defendant.*	:	CIVIL ACTION NO. 3:05cv1330 (MRK) AUGUST 1, 2006

SECOND AMENDED COMPLAINT

1. For over twenty years, the plaintiffs State of Connecticut and General Assembly of the State of Connecticut (collectively referred to as the "State" or "Connecticut") have implemented effective assessment and accountability measures for Connecticut's school districts. Through its "state-wide mastery examinations," Connecticut Mastery Test (CMT) for elementary students and Connecticut Academic Performance Test (CAPT) for high school students, Connecticut has led the country in the comprehensive nature and high-quality of its assessments of its students, and in its efforts in focusing attention and resources on low performing school districts.

2. Connecticut's CMT/CAPT assessment scheme has been successful, for Connecticut's students are ranked as among the highest achieving in the nation. Moreover, from 2000 to 2004, the rate of achievement of Connecticut's minority students and students from the most disadvantaged school districts on the CMTs was statistically significantly greater than the rate of achievement of students in more economically-advantaged school districts.

3. Approximately four years ago, the federal government adopted Public Law 107-110, the No Child Left Behind ("NCLB") Act, codified at 20 U.S.C. §6301 *et seq*. The NCLB Act imposes a comprehensive educational assessment and accountability regime upon the States. The NCLB Act adopts many of the principles and some of the elements of Connecticut's CMT/CAPT assessment scheme.

4. At all times relevant to this complaint, the State has been in compliance with the requirements of the NCLB Act as interpreted and imposed by the U.S. Department of Education ("USDOE"). In July 2004, Connecticut was named in the Education Commission of the States report as one of the top five states in compliance or on track to be in compliance with all 40 requirements of the NCLB Act.

5. With respect to requiring state or local funding to meet its statutory requirements, the NCLB Act provides as follows:

> (a) GENERAL PROHIBITION. **Nothing in this chapter shall be construed to** authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or **allocation of State or local resources, or mandate a State or any subdivision thereof to spend <u>any</u> funds or incur <u>any</u> costs not paid for under this chapter.**

Section 9527(a) as codified at 20 U.S.C. §7907(a) (emphasis added) (the "Unfunded Mandates Provision"). The Unfunded Mandates Provision prohibits the federal government from directing or controlling the States' programs or curricula and requires full federal government funding for the provisions of the NCLB Act.

6. By contrast the Defendant Secretary of Education Margaret Spellings (the "Secretary" or "Secretary Spellings"), an officer of the federal government, contends that

she has full authority to require States and local educational agencies to expend their own funds to satisfy the requirements of the NCLB Act as interpreted by the Secretary.

7. There is a fundamental disagreement between the State and Secretary regarding the meaning and statutory interpretation of the Unfunded Mandates Provision of the NCLB Act.

8. Federal funding to Connecticut for NCLB mandates is substantially less than the costs attributable to the federal requirements of the NCLB Act.

9. The State currently is spending its own funds to satisfy the requirements of the NCLB Act.

10. The State, by and through its Commissioner of Education, has requested waivers from certain NCLB mandates from the Secretary. Connecticut has requested waivers to permit the State to substitute annual CMT testing with formative testing in grades 3, 5 and 7; to permit a three-year phase-in for English language learner ("ELL") students before they are assessed; and to allow special education students to be afforded the option of being tested at instructional level rather than at grade level.

11. With certain non-applicable exceptions, the NCLB Act expressly grants the Secretary of Education the authority to grant waivers from any of the NCLB Act's statutory requirement and any of its regulatory interpretations. NCLB Act § 9401, codified at 20 U.S.C. § 7861.

12. Secretary Spellings has denied most of Connecticut's waiver requests and has adhered to a rigid, arbitrary and capricious interpretation of the NCLB mandates.

13. With respect to Connecticut's alternate-grade formative testing waiver request, Secretary Spellings has refused to exercise her statutory authority. Rather, the Secretary has abdicated her statutory duty to meaningfully consider a waiver request of *any* statutory and *any* regulatory requirement of the NCLB Act.

14. By denying Connecticut's waiver requests, the Secretary is requiring Connecticut to expend substantial sums in excess of federal funding to comply with the NCLB mandates as interpreted by the Secretary and the USDOE.

15. Effective July 1, 2003, the plaintiff Connecticut General Assembly amended Connecticut's testing statutes to conform to the testing requirements of the NCLB Act. Public Act no. 03-168, codified at Conn. Gen. Stat. § 10-14n. Consistent with the Unfunded Mandates Provision of the NCLB Act, the Connecticut General Assembly expressly required that the costs attributable to the additional federal requirements of the NCLB Act shall "be paid exclusively from federal funds." Conn. Gen. Stat. § 10-14n(g).

16. Because the State had exhausted its federal funding on NCLB Mandates, the plaintiff Connecticut General Assembly amended Conn. Gen. Stat. § 10-14n, effective July 1, 2006, to eliminate the state law restriction. Pub. L. no. 06-135.

17. Connecticut could not comply with both its state statute and the USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates unless the mandates of the NCLB Act are either fully funded or the mandates are waived.

18. In July 2003, the General Assembly also commissioned studies to "evaluate the estimated additional cost to the state and its local and regional boards of

education for compliance with the requirements of the [NCLB Act], net of appropriated federal funds for such purpose." Conn. Pub. Act nos. 03-168, 04-254.

19. Both of those studies determined that, assuming level funding, federal educational funding was insufficient to satisfy the additional costs to comply with the requirements of the NCLB Act imposed upon the State and local boards of education.

20. The current proposed federal education budget will reduce federal education funding available to the State, thus increasing and exacerbating the underfunding of NCLB mandates.

21. The Secretary is violating the Unfunded Mandates Provision of the NCLB Act by requiring the State of Connecticut and its school districts to comply with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates even though she has the authority to waive these mandates and the State of Connecticut and its school districts have not been provided with sufficient federal funds to pay for such compliance.

22. The Secretary is violating the Spending Clause (Article I, Section 8) of the United States Constitution by requiring the State of Connecticut and its school districts to comply with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates even though she has the authority to waive any of these mandates and the State of Connecticut and its school districts have not been provided with sufficient federal funds to pay for such compliance.

23. In her denial of Connecticut's waiver requests, the Secretary was arbitrary, capricious, abused her discretion and with respect to the formative-testing request,

abdicated her statutory duty to consider waivers of *any* statutory or regulatory requirement of the NCLB Act.

JURISDICTION AND VENUE

24. Pursuant to 28 U.S.C. §§ 1331, 2201, 2202 and 5 U.S.C. §§ 702, 703, 704, and 706, this Court has jurisdiction over the parties and claims in this lawsuit.

25. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e).

PARTIES

26. The Plaintiff State of Connecticut has a fundamental, long-standing and well-established concern regarding the education of its citizens. As enshrined in its State Constitution since 1818, every child in Connecticut is entitled to a free public elementary and secondary education. Connecticut Constitution, Article Eighth. The educational interests of the State include, but are not limited to, the concern that each child have equal opportunity to receive a suitable program of educational experiences; that each school district finance an educational program designed to achieve this end; and that in order to reduce racial, ethnic and economic isolation, each school district shall provide educational opportunities for its students to interact with students and teachers from other racial, ethnic, and economic backgrounds.

27. The Plaintiff General Assembly of the State of Connecticut is vested with the legislative power of the State, and determines the expenditure of State funds. The Plaintiff General Assembly enacted Connecticut's state-wide mastery examination statutory scheme. *See* Conn. Gen. Stat. §10-14n. By passage of Public Act no. 03-168, codified at Conn. Gen. Stat. § 10-14n(g), the Plaintiff General Assembly has

modified Connecticut's state-wide mastery examination statutory scheme to coordinate with NCLB Act, but only to the extent that state funds are not used for the NCLB Mandates. By passing Public Act no. 05-2, the Plaintiff General Assembly authorized the Attorney General to bring a legal action to enforce the provisions of the NCLB Act on behalf of the State and the General Assembly.

28. One hundred nineteen (119) of Connecticut's 169 school boards have passed resolutions in support of the State's lawsuit to enforce the provisions of the NCLB Act.

29. Defendant Secretary of Education Margaret Spellings is the Secretary of the United States Department of Education. Secretary Spellings serves as the chief administrative officer of USDOE, and is responsible for overseeing implementation and enforcement of the NCLB Act, including, inter alia, approving or disapproving State plans submitted under the NCLB Act, see 20 U.S.C. § 6311(e), providing NCLB funds to, or withholding NCLB funds from, States, see 20 U.S.C. §§ 1234d, 6311(g), and otherwise taking action to obtain compliance with the NCLB mandates, see 20 U.S.C. § 1234d. With certain limited exceptions, Secretary Spellings also is authorized to waive *any* statutory or regulatory requirement of the NCLB Act. Secretary Spellings is sued in her official capacity for her own actions or omissions or those of individuals working under her control or supervision.

THE NO CHILD LEFT BEHIND ACT

30. On January 8, 2002, President George W. Bush signed into law the 2001 reauthorization of the Elementary and Secondary Education Act of 1965 ("ESEA"), the

principal federal statute relating to elementary and secondary education at the State and local levels. Since 1965, the ESEA has provided "Title I" funds to the States. Title I funds historically have been targeted for direct instruction of the nation's neediest children and the State of Connecticut typically directs Title I funds to its poorest school districts. The prior reauthorization of the ESEA was enacted in 1994, with the passage of the Improving America's Schools Act ("IASA"). The 2001 reauthorization of the ESEA is titled the "No Child Left Behind Act" ("NCLB Act").

31. The NCLB Act, like the original ESEA and all of its subsequent reauthorizations, was enacted by Congress pursuant to its power under Article I, Section 8, cl. 1 of the United States Constitution – i.e., the Spending Clause. The Spending Clause permits Congress to condition the receipt of federal funds on the recipients' compliance with certain obligations, provided that the conditions under which the federal funds will be made available are unambiguously set forth in the statute.

32. The NCLB Act seeks to increase accountability and flexibility in the educational process. The primary purpose of the Act is to ensure that "high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards." NCLB Act § 1001(1) codified at 20 U.S.C. § 6301(1).

33. Unlike past versions of ESEA, however, the NCLB Act affects all students in the nation's public schools, (not only those in public schools that qualify for and receive Title I funding), imposes mandatory assessments for all public schools, requires

specific data collection and reporting, and establishes severe, progressive sanctions for failure to meet arbitrary educational goals.

34. When passing the NCLB Act, Congress repeatedly emphasized that it was not creating a lowest-common denominator system, but rather, sought to ensure that all children had the opportunity to obtain a high-quality education and reach proficiency as measured by challenging State academic achievement standards.

35. Among other provisions, the NCLB Act requires that States and school districts develop challenging academic standards,

36. When implementing the NCLB mandates, a State must choose methods and instructional strategies that are grounded in scientifically based research. *See, e.g.*, NCLB Act § 1001(9) codified at 20 U.S.C. § 6301(9).

37. Each state's plan of standards and assessments is subject to a peer review process and the Secretary's approval. *See* NCLB Act §1111(e) codified at 20 U.S.C. § 6311(e).

38. The State's assessments are currently being reviewed by the peer review process. The State's assessments have been determined to be sound, and have been orally approved, with written approval being deferred until a technical run of the assessment system can be performed after the State's March 2006 assessments are conducted. By letter dated May 22, 2006, the State has been informed that "the status of Connecticut's standards and assessment system is 'Approval Expected'", pending completion of certain technical requirements. The State has not been informed that its standards and assessments system goes beyond the requirements of the NCLB Act.

39. Unless and until a state receives written confirmation of the Secretary's approval, a state's plan is not approved, and a state cannot rely upon its submitted plan as proof of its compliance with the provisions of the NCLB Act. A state also cannot rely upon oral assurances or suggestions.

40. Under the NCLB Act, every State, the District of Columbia and Puerto Rico was required to submit a draft NCLB Accountability Plan to USDOE, in "workbook" form, by January 2003, including written assurances that the State would follow the approved plan. The workbook plan was then subjected to negotiations and discussions with USDOE officials. Connecticut's plan was amended several times and was fully approved by the Secretary on June 10, 2003.

41. When the Secretary approved the State's plan, she never informed the State that its proposals were above and beyond the requirements of the Act. She also never informed the State that it did not need to abide by its assurances to comply with its plan because its plan provided more than the Act required.

42. Connecticut is and remains in compliance with the assurances contained in its NCLB plan approved by the Secretary.

43. The NCLB Act requires States and school districts to test students in grades 3-8 and high school in mathematics and reading or language arts and to test science knowledge at least once in grades 3-5, 6-9 and 10-12. NCLB Act § 1111(b)(1), (b)(3)(A), (C), codified at 20 U.S.C. § 6311(b)(1), (b)(3)(A), (C).

44. The NCLB Act also requires each state to adopt a third academic indicator, as "determined by the State." NCLB Act § 1111(b)(2)(C)(vii) codified at 20

U.S.C. § 6311(b)(2)(C)(vii). An additional state assessment is one of the enumerated statutory choices for the third academic indicator. The Secretary has approved Connecticut's choice of continuing its twenty-year history of conducting writing assessments as its third academic indicator.

45. Each state's assessments must involve "multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding." NCLB Act § 1111(b)(3)(C)(vi), codified at 20 U.S.C. § 6311(b)(3)(C)(vi).

46. Each state's assessments must "measure the achievement of students against the challenging State academic content and student academic achievement standards." NCLB Act § 1111(b)(3)(C)(vii), codified at 20 U.S.C. § 6311(b)(3)(C)(vii),

47. Each state's assessments must be shown to be of adequate technical quality. NCLB Act § 1111(b)(3)(C)(iv), codified at 20 U.S.C. § 6311(b)(3)(C)(iv).

48. In developing their assessments, the NCLB Act requires the States to develop assessments that are "consistent with relevant, nationally recognized professional and technical standards." NCLB Act § 1111 (b)(3)(C)(iii), codified at 20 U.S.C. § 6311(b)(3)(C)(iii).

49. A state's assessments must be linked to its curriculum standards. NCLB Act § 1111(b)(3)(C)(i) codified at 20 U.S.C. § 6311(b)(3)(C)(i). Thus, a change in a state's assessment will necessitate a change in a state's curriculum standards.

50. When developing their assessments, the NCLB Act requires the States to make "reasonable adaptations and accommodations for students with disabilities (as

defined under section 602(3) of the Individuals with Disabilities Education Act) necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards." NCLB Act § 1111 (b)(3)(C)(ix)(II), codified at 20 U.S.C. § 6311(b)(3)(C)(ix)(II).

51. Over its twenty-year history of Connecticut's assessments, the State has made reasonable accommodations for the testing of special education students, including permitting them the option of being tested at instructional level rather than at grade level.

52. When developing their assessments, the NCLB Act requires the States to assess English language learner ("ELL") students in a "valid and reliable manner" and provide "reasonable accommodations on assessments." NCLB Act § 1111 (b)(3)(C)(ix)(III), codified at 20 U.S.C. § 6311(b)(3)(C)(ix)(III).

53. Conclusive scientifically based research has determined that ELL students require at least three years, and can require up to seven years to attain sufficient proficiency in English to be properly assessed.

54. The Secretary interprets the ELL NCLB provisions as requiring the States to test ELL students in mathematics immediately and in either English or their native language, after one year in a United States school. Under the Secretary's interpretation, if a state only gives assessments in English, ELL students must be tested in reading or language arts after one year. By contrast, the States that have foreign language assessments can wait for three years before their ELL students must be

tested in English for reading or language arts. NCLB Act § 1111 (b)(3)(C)(x), codified at 20 U.S.C. § 6311(b)(3)(C)(x).

55. When passing the NCLB Act, Congress expressly and repeatedly forbade the federal government from mandating, directing or controlling a state's instructional content, assessments, curriculum or program of instruction for any students. *See* NCLB Act §§ 1111(b)(6), 1905, 3129, 6301, 9526(b) codified at 20 U.S.C. §§ 6311(b)(6), 6575, 6849, 7371, 7906(b). The Secretary may not "require a State, as a condition of approval of the State plan, to include in or delete from, such plan one or more specific elements of the State's academic content standards or to use specific academic assessment instruments or items." NCLB Act § 1111(e)(1)(F) codified at 20 U.S.C. § 6311(e)(1)(F).

56. The broad language of the NCLB Act required the USDOE to issue extensive clarification to States and local school districts. In the few years since the enactment of the NCLB Act, the USDOE had already issued numerous guidance documents, at least twenty letters to chief state school officials, hundreds of letters to State and local officers, and several sets of informal and formal regulations.

57. The regulations address key issues, including public school choice requirements, standards and assessments, the definition of "highly qualified teacher," and the inclusion of students with significant cognitive disabilities.

58. A state's assessments must be administered to 95% of the public school students in the State to determine whether students in each grade and in each subgroup are making Adequate Yearly Progress ("AYP").

59. The NCLB Act imposes progressively severe consequences for failing to make Adequate Yearly Progress (AYP).

60. A school fails to make its requisite AYP if the required percentage of any subgroup of its students, in any grade, fails to satisfy the State's proficiency standard. Such subgroups consist of economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency. 20 U.S.C. § 6311(b)(2)(C).

61. States and school districts are required to take corrective action in Title I schools and school districts in which any subgroup of their students fails to make AYP on the State assessments, including:

a) offering all students in Title I schools that fail to make AYP for two years the option to transfer to another public school within the school district (regardless of whether the other school has the capacity for more students) (20 U.S.C. § 6316(b)(1)(E)). One way a school would fail to make AYP for two years is if one subgroup fails to satisfy the State's proficiency standard in one year, and a different subgroup fails to satisfy the State's proficiency standard for the next year and yet all students, including those whose subgroup is making AYP, have the option to transfer;

b) providing supplemental education services to students in schools that fail to make AYP for three years (20 U.S.C. § 6316(b)(5)(B));

c) implementing "corrective action" in schools that fail to make AYP for four years (20 U.S.C. § 6316(b)(7)); and

d) restructuring schools that fail to make AYP after one full year of corrective action (20 U.S.C. § 6316(b)(8)).

62. Ensuring that students in each grade, and in each subgroup, make AYP is critical to a school -- failure to do so will ultimately result in the dissolution of the school -

- and each of the progressive corrective action steps require the school to divert its federal funding from core academic endeavors to fund the NCLB sanctions.

63. Federal educational funding is significant and crucial to Connecticut's public schools, especially the schools that serve the neediest student populations. From 2002-2005, NCLB federal funding to Connecticut, which includes Title I, averaged between $175 and $184 million, and overall federal funding for elementary and secondary level programs ranged between $287 and $325 million for the same time period. Due to proposed budget cuts, the estimated federal education funds for 2006 and 2007 are reduced, with an estimated $178 million for NCLB funding in fiscal years 2005-06, dropping to an estimated $163 million in fiscal years 2006-07.

64. While federal education funding represents approximately 5% of overall educational spending in the State, it represents a significantly higher percentage for the State's poorest and most disadvantaged school districts. For example, for the 2003-04 fiscal year, federal educational funding represented between 10% and 15% of the school budgets for Bridgeport, Hartford, New Haven, New London and Windham**.**

65. The NCLB Act also permits the Secretary to withhold a state's administrative funds in a given year, without any apparent administrative constraints. NCLB Act §1111(g)(2) codified at 20 U.S.C. § 6311(g)(2). Connecticut's administrative funds are approximately $3 million per year and are used to fund implementation of the NCLB Act.

66. Based on Connecticut's knowledge and belief, the USDOE does not have an administrative procedure for declaratory rulings. Rather, the administrative

procedures set forth in the General Education Provisions Act ("GEPA") are used only to appeal adverse audit findings that seek the return of federal funds.

67. The consequences of opting-out of the NCLB Act apparently are not limited to Title I funding. The State of Utah formally posed the question of opting-out of the mandates of the NCLB Act to the USDOE. In 2004, the USDOE responded that not only would Utah lose its NLCB funds (including its Title I funds), but it also would forfeit nearly twice that much in other formula and categorical funds because all federal funding that relied upon the Title I formula would also be forfeited. Unrelated programs such as the special education funds under the IDEA, and preschool programs for handicapped children, would be negatively affected.

68. Applying USDOE's response to Utah's request to Connecticut's situation, Connecticut would lose hundreds of millions of dollars in Title I funds and unrelated federal education funds if it opted out of the NCLB mandates imposed by USDOE.

69. Moreover, given the Secretary's position on the extent of her authority, Connecticut risks losing hundreds of millions of dollars in NCLB funds and unrelated federal education grants if it were deemed to have violated the NCLB mandates imposed by USDOE, or deemed to have "violated" its assurances to the USDOE.

NCLB ACT PROHIBITION AGAINST UNFUNDED MANDATES

70. The Unfunded Mandates Provision of the NCLB Act provides in full as follows:

> (a) GENERAL PROHIBITION. **Nothing in this chapter shall be construed to** authorize an officer or employee of the Federal Government to **mandate, direct, or control** a State, local educational agency, or school's curriculum, program of instruction or **allocation of State or local**

> **resources or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.**

Section 9527(a), as codified at 20 U.S.C. §7907(a) (emphasis added).

71. The exact language in the Unfunded Mandates Provision was carried over from the IASA, (the 1994 reauthorization of the ESEA,) where it was included for the express purpose of prohibiting "unfunded mandates" on States and school districts.

72. By its plain terms, the Unfunded Mandates Provision prohibits the federal government from requiring States or school districts to spend their own funds in order to comply with the requirements of the NCLB Act.

73. When it passed legislation to implement the NCLB Act, the Connecticut legislature understood the NCLB Act's Unfunded Mandates Provision to mean that Connecticut would not be required to spend its own funds to comply with the requirements of the NCLB Act.

74. Nonetheless, the Secretary interprets the NCLB Act, including the Unfunded Mandates Provision, as permitting her to require states and local educational districts to spend their own funds in order to comply with the Act's requirements.

75. In its enactment in 2002, the NCLB Act contained the unusual provision of establishing certain authorized funding levels from 2002 through 2007. For ESEA Title I grants to local educational agencies (LEAs), Congress authorized $13.5 billion in appropriations for fiscal year 2002, increasing annually to $25 billion by fiscal year 2007. (20 U.S.C. § 6302). Actual NCLB appropriations for ESEA Title I grants to LEAs, however, have fallen far short of authorized appropriations. To date, such

appropriations have ranged from $10.3 billion to $ 12.7 billion, in the end almost half of the authorized appropriation levels envisioned in the original Act.

76. Indeed, in the most recent budget proposal to Congress, the President is proposing reductions in the amount of education funding. By contrast, the State has increased educational spending every year since 2002. For example, the State's funding to its neediest schools through its priority school district grants has increased 35% from 2003 to the present.

77. The General Accounting Office (GAO) has estimated that from 2002 through 2008, the States will spend approximately $3.9 billion to $5.3 billion simply on developing and administering the annual assessments required by the NCLB Act, not including the tests required for special education students and English language learners.

78. The GAO estimated that the federal benchmark appropriations would meet only 59% of Connecticut's estimated expenses for NCLB Act assessments.

79. The unfunded burden on the State of Connecticut (at the State level, as opposed to the local level) of meeting the NCLB Act requirements through fiscal year 2008 will be in the tens of millions of dollars.

80. In response to the General Assembly's statutory enactments in Public Acts 03-168 and 04-254, the Connecticut Secretary of the Office of Policy and Management and the Commissioner of Education issued a report on the State's costs associated with compliance with the NCLB Act ("State Cost Study"). The March 2005 State Cost Study calculated that the difference between federal NCLB funding and state

costs of complying with NCLB mandates would be $41.6 million from fiscal year 2003 through fiscal year 2008.

81. The State Cost Study also estimated that $8 million of that overall funding shortfall was due to the USDOE's requirements regarding state standards and assessments.

82. For the Connecticut assessments to be given in March 2006, the State will spend approximately $14.4 million on the assessments, whereas only $5.8 million is provided for assessments by the federal government, resulting in an $8.6 million shortfall this year for assessments.

83. Since the State Cost Study was conducted, the Secretary has issued additional guidance on permissible "reasonable accommodations" for special education assessments. To conduct the modified special education assessments required by the Secretary, the State will incur an additional $1.5 million dollars in assessment costs for special education students per year that are not covered by the federal funds provided to the State for assessments.

84. The unfunded burden on the local school districts in the State of Connecticut of meeting the NCLB Act requirements through fiscal year 2008 will be in the hundreds of millions of dollars.

85. In response to the General Assembly's statutory enactments in Public Acts 03-168 and 04-254, the Connecticut Secretary of the Office of Policy and Management and the Commissioner of Education issued a report on the costs associated with compliance with the NCLB Act by the local school districts ("Local Cost

Study"). The April 2005 Local Cost Study determined that in order to meet the requirements of the NCLB Act as implemented by the USDOE, Connecticut's local school districts would have to commit hundreds of millions of dollars in local funds above and beyond the educational funding provided by the federal government.

86. Pursuant to the plain language of the NCLB'S Unfunded Mandates Provision, the USDOE and its officials cannot "mandate, direct or control" the allocation of any State or local resources.

87. Pursuant to the plain language of NCLB'S Unfunded Mandates Provision, the USDOE and its officials cannot require any State or subdivision of a State to take actions under the NCLB Act that would require the State or subdivision to draw upon its own monetary resources.

CONNECTICUT'S HISTORY OF ASSESSMENTS

88. Since 1986, Connecticut's public school students in grades 4, 6, and 8 have been annually required to take the CMT, and since 1994 its public high school students to take the CAPT. The State's tests require from six hours for 4th graders to 8.5 hours for high school students on reading, writing and mathematics, now conducted over a three to four week period. Designed to measure higher-level thinking and communication skills, the tests utilize short essays and written explanations as well as multiple choice questions.

89. For over twenty years, well before the enactment of NCLB in January 2002, the State of Connecticut has implemented effective, high standards and accountability measures for its school districts.

90. Conclusive scientific research has determined that Connecticut's assessments of its high school students (CAPT) are as good as (and in some instances superior to) the Standardized Achievement Tests (SATs) as predictors to academic success on the college level.

91. Connecticut's assessments are among the most rigorous in the nation. The content, format and alignment of the assessments have been approved by the Secretary. At no time prior to the pendency of Connecticut's waiver requests did the Secretary ever suggest that Connecticut's testing was beyond the requirements of the NCLB Act, or that Connecticut did not need to comply with its assurances because its plan elements exceeded what was required under the Act.

92. Since 1990, special education students have had the option of having the student's individualized education plan permit the student to take the State's assessments at the student's instructional level rather than at their grade level when appropriate. For example, a 10th grader who was being instructed at an 8th grade level for mathematics, pursuant to the student's individualized education plan, would be able to take the 8th grade CMT mathematics test.

93. For twenty years, the State of Connecticut has tested its ELL students. The State historically permitted ELL students three years (or thirty months) in the United States school systems before being required to take the State's assessments. In response to federal government requirements and at the direction of USDOE, the state reluctantly modified its requirements to conform with the federal government's requirements. The State's assessments are only offered in English, and have not been

developed or offered in any foreign language. Providing tests in the 150 languages spoken by ELL students in Connecticut would cost millions of additional dollars.

94. Proficiency in English is necessary for all elements of the State's assessments. For example, Connecticut's mathematics tests include word problems requiring written explanatory answers as well as numeric calculations, and thus English proficiency is necessary in order to take the CMT mathematics tests.

95. For over a decade, the State of Connecticut has annually profiled and published the assessment results for its school districts and schools for accountability and student achievement pursuant to demographic and racial indices, including subcategories of student performance, together with a subcategory based on a high percentage of students eligible for free or reduced price lunches.

96. For approximately twenty years, the State of Connecticut has directed additional resources for school readiness and reading programs, and school construction projects to school districts with a high concentration of students performing below the level of proficiency.

97. Since 1997-1998, Connecticut has spent over $600 million in new funds on preschools, early reading instruction, after-school programs, and a wide variety of other instructional support programs, targeted to school districts where the largest concentration of high needs students reside.

98. Connecticut's students are consistently ranked as among the top in the Nation.

99. In the most recent NAEP report of results from 1992 to present, Connecticut was cited as having a significant closing of the academic achievement gap for its Black/Hispanic students for 4th grade students in both reading and mathematics.

100. An estimated 86% of Connecticut's 2005 high school graduates (public and nonpublic combined) took the SAT, compared to a national average of 49%. Connecticut tied as having the highest participation rates in the nation. Connecticut's 2005 high school graduates recorded the highest combined average SAT scores in 31 years, and the highest scores for black, Hispanic, Asian and white students ever since the data was first reported by race (29 years ago). Almost one-quarter of Connecticut's SAT takers scored 600 or above on either the verbal or math sections, the highest levels since 1977, and above the national average.

101. In March 2005, the College Board introduced a writing assessment as part of the SAT, the scores of which will be reported for the class of 2006.

102. In the most recent Advanced Placement (AP) test results, Connecticut was cited as one of five states that had a tremendous increase in the number of Black and Hispanic students participating in the AP testing, and a significant increase in the number of Black and Hispanic students who obtained a score of 3 or better.

CONNECTICUT'S WAIVER REQUESTS & PLAN AMENDMENTS

103. The "Secretary may waive <u>any</u> statutory or regulatory requirement" of the NCLB Act, as set forth in § 9401 and codified at 20 U.S.C. § 7861.

104. When States have requested waivers from specific provisions of the NCLB Act due to insufficient funding from the federal government, the USDOE, its Secretary and/or officials have flatly denied such waiver requests.

105. On January 14, 2005, the State of Connecticut Commissioner of Education Betty J. Sternberg ("Commissioner Sternberg"), submitted a two-and-one-half page letter to the defendant Secretary Spellings, requesting waivers from the USDOE's interpretations of the NCLB Mandates to permit Connecticut to maintain its successful assessment scheme in the following areas:

a) for annual testing to take place in alternate grades rather than every grade and to instead integrate technology into the existing testing process and conduct formative testing in the alternate years (grades 3, 5 and 7);

b) for the option to conduct a "cohort" analysis – comparing how a group of students progress over time (from year to year) rather than, for example, comparing this year's third grade with last year's;

c) for the ability to assess up to 2% of special education students at their instructional level rather than their grade level; and

d) for the ELL students to be permitted three years in U.S. school systems to learn English before sitting for the assessments.

106. The two-and-a-half page January 2005 letter was the only "application" required to apply for a waiver.

107. Connecticut's waiver requests were based on its over twenty years of success with its assessments, and were grounded upon scientifically based research.

108. Connecticut was not seeking to avoid testing in grades 3, 5 and 7 -- Connecticut was seeking to apply formative testing in those grades rather than the summative testing required by the Secretary.

109. Formative tests are administered multiple times throughout the year rather than annually. They give teachers, students and parents immediate, frequent feedback. Teachers use this feedback to change or "customize" instruction for each child continuously during the year. Formative assessment helps low achievers more than other students and so reduces the range of achievement while raising achievement overall, and has been found to produce significant and often substantial learning gains.

110. Formative testing is solidly grounded in scientifically based research, whereas there is no conclusive research that the summative testing required by the Secretary has any positive effect on student academic achievement.

111. Connecticut has had success in using formative testing. For example, over 95% of the student population at the Amistad Academy are minority students, and most are from economically disadvantaged circumstances. Amistad has been using formative testing with remarkable results. Amistad Academy ranks as one of the top ten schools in Connecticut in terms of the greatest growth in its results on the CMT for 4th grade reading.

112. If the Secretary had granted Connecticut's waiver request to conduct its traditional CMTs in grades 4, 6 and 8 and to conduct formative testing in grades 3, 5,and 7, Connecticut would have had sufficient federal funding to cover the costs of the assessments.

113. If the Secretary had granted Connecticut's request to conduct formative testing in grades 3, 5, & 7, the teachers, students and parents would have immediate,

frequent test results that would permit immediate instructional decisions to be made to assist the students.

114. In her January 14, 2005 waiver request, Commissioner Sternberg also asked for a reasonable accommodation regarding the timing of testing ELL students. Although a state could administer the required tests to ELL students by creating the tests in their native languages, it was not practical in Connecticut because the State has over 150 languages spoken in the homes of its students. To create, administer and grade such a broad range of foreign language tests would cost tens of millions of additional dollars, the costs of which are not covered by the allocated federal funding.

115. The USDOE has interpreted the provisions on ELL student assessments as requiring that ELL students take mathematics assessments upon entry into the school system, even if the mathematics assessments consist of word problems in English only. Moreover, if a State does not offer its assessment in an ELL student's native language, the ELL student must take the assessment in language arts within one year of entry into the United States school system. If, however, a State offers its assessments in the ELL student's native language, the student may be assessed in his or her native language for three years, and thereafter must be assessed in English. Connecticut only offers its CMT in English.

116. Connecticut's mathematics assessments involve word problems as well as computation problems, and thus a student must be able to read English in order to understand the word problems. Nonetheless, under the Secretary's interpretation, Connecticut's ELL students must immediately take the mathematics assessments, and

must take the reading assessment within one year of attendance at a United States school.

117. In her January 14, 2005 waiver request, Commissioner Sternberg also requested permission to offer the option of permitting special education students to be assessed at their instructional level rather than at their chronological grade level, to the extent it was deemed appropriate by a student's Individualized Education Program (IEP). Assessing a special education student at instructional level rather than chronological grade level would be cost-neutral.

118. Assessing a special education student at instructional level rather than grade level is a reasonable accommodation.

119. On February 4, 2005, Representative Nancy L. Johnson wrote to Secretary Spellings urging her to contact and/or meet with Commissioner Sternberg to discuss Connecticut's waiver requests.

120. On February 28, 2005, defendant Secretary Spellings denied Commissioner Sternberg's waiver requests to conduct formative testing in the alternate years, and the three-year phase-in time period to test English language learners. She asked for more information on cohort analysis, and indicated that a policy change on special education testing was under consideration.

121. Prior to issuing her February 28, 2005 denial, neither Secretary Spellings nor anyone from the USDOE ever contacted Commissioner Sternberg or her staff regarding Connecticut's January 14, 2005 waiver requests.

122. As far as Commissioner Sternberg or her staff knows, the only document Secretary Spelling had before her when she denied the waiver requests was the two-and-a-half page letter of January 14, 2005.

123. On March 2, 2005, Deputy Secretary Raymond Simon appeared before the state board of education. When first informed of Deputy Secretary Simon's planned appearance in Connecticut, state officials assumed that he would discuss the January 14, 2005 waiver requests with staff. The denial letter appeared a few days before his visit, and during the board meeting, Deputy Secretary Simon indicated that a waiver to permit alternate-grade formative testing "simply would not happen."

124. On March 20, 2005, an op-ed article authored by Secretary Spellings was printed in the *Hartford Courant*, stating that "we cannot exempt a single class or grade level" and that annual assessments were one of the linchpins of the NCLB Act.

125. On March 31, 2005, Connecticut Governor M. Jodi Rell wrote to Secretary Spellings, complaining about the Secretary's refusal to meet with Commissioner Sternberg or to discuss Connecticut's waiver request regarding alternate-grade formative testing.

126. On March 31, 2005, Commissioner Sternberg once again wrote to the federal Department of Education, requesting, in part, waivers from USDOE's policy interpretations pursuant to §9401 of NCLB. In her March 31, 2005 letter, Commissioner Sternberg renewed her prior request for annual, alternate-grade testing with formative testing in the alternate years, and for a three year phase-in for testing of ELL students.

127. On April 5, 2005, the Attorney General for the State of Connecticut announced that he was contemplating bringing a lawsuit regarding the federal Department of Education's implementation of the NCLB Act.

128. On April 7, 2005, Secretary Spellings announced a new, more "workable, common sense" policy from the rigid special education testing requirements, in addition to the 1% exception for the most cognitively challenged special education students. At that time, Secretary Spellings explicitly stated that States that did not have annual every-grade testing would not be eligible for the new policy, and that only states that "follow the principles" of NCLB "will be eligible" to use the new policy.

129. Secretary Spellings' new "workable" proposed policy for special education testing does not permit testing at instructional level. Rather, it contemplates permitting an additional 2% of students to be tested using "modified' or alternate assessments, for a total of 3% of the students being permitted specific, prescribed special education accommodations. The alternate assessments would require the development and administration of a separate, parallel testing regime for each grade, with "modifications" for special education students.

130. In order to develop and administer the special education alternate assessment testing regime for 2% of the students, Connecticut will incur approximately $1.5 million dollars of additional expenses per year, expenses that are not covered by federal educational funding and were not included in the March 2005 State Cost Study.

131. Testing special education students on topics that they have not been taught, and that their IEPs direct that they not be taught at that time, undermines the

purposes and goals of the Act. Testing ELL students at a time and in a format when they cannot reasonably be expected to understand the questions undermines the purposes and goals of the Act. The Secretary's requirement of unfunded, costly and inaccurate assessments of special education and ELL students undermine the purposes and goals of the Act, and violates the requirement that "reasonable accommodations" be made for the assessments of special education and ELL students.

132. Since issuing her denial to Commissioner Sternberg's waiver request, Secretary Spellings has made numerous public statements that testing in every grade (for grades 3 through 8) is one of the "bright lines" and the "linchpin" of the NCLB Act, and indicated that requests to waive the requirement would not even be considered.

133. By letter dated April 11, 2005, Commissioner Sternberg wrote to the Secretary "if you and members of your staff take time to meet with me and members of my staff, to review our evidence with an open mind, to ask probing questions and truly listen to our answers, you will understand we are not trying to find a loophole."

134. Through the direct efforts of Connecticut's Governor, Commissioner Sternberg and the Chair of the State Board of Education Allan Taylor met with Secretary Spellings and Deputy Secretary Raymond Simon on April 18, 2005. During the meeting, the Secretary and Deputy listened politely to the State's explanation of their waiver requests. After the explanation was provided, the remainder of the meeting primarily focused on whether Connecticut would bring suit and if so, what legal claims would be made.

135. Within an hour of their meeting with the Secretary and Deputy Secretary, Commissioner Sternberg and Chairman Taylor were interviewed by the press regarding their meeting. When they began to inform the press that they were optimistic that the waiver requests would be considered, the press informed them that the Secretary had already announced to the press that no waivers would be granted.

136. The Secretary never gave Commissioner Sternberg's reasons supporting Connecticut's waiver request any consideration.

137. The next day, Deputy Secretary Simon spoke with Commissioner Sternberg prior to a meeting and orally suggested that Connecticut provide multiple-choice testing in grades 3, 5 and 7, rather than provide the CMT tests in those grades.

138. Approximately a month later during a telephone conversation with Commissioner Sternberg, Mr. Simon orally suggested that Connecticut eliminate writing as its third academic indicator and substitute it with daily attendance records.

139. Mr. Simon's oral "suggestions" regarding alternate-year multiple-choice testing and eliminating Connecticut's writing assessments were never confirmed in writing to Connecticut, and the State never received any assurances that applying radically different testing schemes in grades 3, 5, and 7 from the testing schemes in grades 4, 6, and 8 would be approved by the USDOE, or satisfy peer review**.**

140. Mr. Simon's oral suggestions would have required Connecticut to redesign and modify its state plan, curriculum standards, and assessments, contrary to NCLB Act §§ 1111(b)(6), 1111(e)(1)(F), 1905, 3129, 6301, 9526(b) codified at 20 U.S.C. §§ 6311(b)(6), 6311(e)(1)(F), 6575, 6849, 7371, 7906(b).

141. Mr. Simon's oral suggestions would have required Connecticut to substitute major components of the State's plan, submit the revised plan to USDOE for review, and submit the revised elements for peer review.

142. If Connecticut had adopted Mr. Simon's oral suggestions, the $5.8 million in federal funding allotted annually for assessments would remain insufficient to cover the costs. Specifically, if Connecticut maintained its approved testing scheme for grades 4, 6, 8 and 10, implemented only multiple-choice testing for grades 3, 5 and 7, used only multiple-choice testing for the science tests for grades 5, 8 and 10, and eliminated its writing assessments altogether, and such a testing regime was accepted by peer review and approved (in writing) by the Secretary, the State would incur annual costs of approximately $9.9 million. Thus, the federal funds would still be insufficient to implement such a testing scheme by at least $4 million annually.

143. On April 22, 2005, Commissioner Sternberg wrote to Secretary Spellings, explaining why Mr. Simon's oral suggestion of implementing multiple-choice testing only in grades 3, 5 and 7 was unworkable, seeking again permission to conduct formative testing in grades 3, 5 and 7, and reiterating Connecticut's request for an instructional level testing option for its special education students.

144. On April 27, 2005, Connecticut Department of Education staff sent further information to USDOE in support of Connecticut's request for a three-year phase-in period for its ELL students.

145. On May 3, 2005, Secretary Spellings renewed her denial of the request to permit alternate grade formative testing. Rather than commit to provide sufficient

additional funding to cover the costs of every grade testing, the Secretary suggested that Connecticut divert federal funds from other programs, such as reading tutors for inner city youths, to pay for the additional testing costs. She indicated that Connecticut's renewed waiver requests regarding ELL students and special education testing were pending.

146. On May 18, 2005, Commissioner Sternberg once again wrote to Secretary Spellings, noting that extensive scientific research supported Connecticut's proposal for formative testing, and that there was no research to support the proposition that testing in every grade was more (or even as) effective than alternate grade testing. Commissioner Sternberg also submitted additional information and arguments in support of Connecticut's waiver requests with respect to ELL students and special education testing.

147. On May 27, 2005, Commissioner Sternberg submitted Connecticut's updated amendments to its accountability plan and renewed waiver requests to Deputy Secretary Simon. In her submission, Commissioner Sternberg renewed and reiterated Connecticut's waiver requests regarding alternate grade formative testing, three-year phase-in for ELL students, and the option to test at instructional level up to 2% of special education students rather than at grade level.

148. In her May 27, 2005 letter, Commissioner Sternberg also sought to amend Connecticut's NCLB Act accountability plan to test ELL students after they had been in the U.S. for three years and to test in mathematics after one year in the U.S. The

Commissioner also reiterated the State's request to test up to 2% of the special education students at instructional level rather than grade level.

149. On June 8, 2005, Commissioner Sternberg formally requested the "interim flexibility" for testing special education students, under the "new, workable" policy announced by Secretary Spellings on April 7, 2005. At the end of July 2005, Connecticut was granted oral permission to test up to 2% of its special education students under an "alternative assessment," and subsequently received written confirmation.

150. Testing up to 2% of special education students at instructional level rather than grade level does not qualify as an "alternative assessment" under the Secretary's interpretation. Rather, in order to take advantage of the alternative assessment "reasonable accommodation," Connecticut would be required to develop and administer an entirely new testing regime for special education students for each grade to be tested. There is insufficient federal funding for the development or administration of these alternative assessments, and the additional cost to Connecticut to do so will be $1.5 million per year.

151. On June 20, 2005, Deputy Secretary Simon informed Commissioner Sternberg that Connecticut's requests for three-year phase-in for ELL students, and testing at instructional level for special education students had been denied. Deputy Secretary Simon treated both requests as plan amendments.

152. At no time before, during or after the plan amendment denials was Connecticut offered an opportunity to revise the amendments, technical assistance, or a

hearing. *Compare* 20 U.S.C. § 6311(e)(1)(E). Indeed, the Secretary had denied prior plan amendments proposed by the State without providing a hearing, and to the State's knowledge, no other state has been provided a hearing prior to the denial of proposed plan amendments.

153. The Secretary has denied Connecticut's waiver requests for formative testing in alternate grades, ELL student phase-in and the option for instructional level testing for special education students.

154. The Secretary has denied Connecticut's plan amendments for ELL student phase-in for assessments and the option for instructional level testing for special education students.

155. On a Friday afternoon in mid-July 2005, the state department of education received an "urgent" telephone call from the USDOE, insisting that it provide the USDOE that day with proof that Connecticut was taking the necessary steps to implement standardized CMT testing in grades 3, 5 and 7.

156. The state department of education provided the requisite assurances and evidence that Friday and on the following Monday**.**

157. The Secretary's persistent denials of Connecticut's waiver requests and plan amendments constitute a final decision of an administrative agency.

158. The Secretary refused to exercise her statutory discretion with respect to Connecticut's alternate-grade formative testing waiver requirement.

159. Since the issuance of her final denials, Secretary Spellings has publicly reiterated that an alternate-grade formative testing waiver request would not even be

considered. For example, in public written statements/letters issued on November 10, 2005 and on February 18, 2006, she indicated that annual testing in reading and math in grades 3 through 8 and once in high school was one of the law's "'bright lines' -- the essential and indispensable markers on the road to implementing NCLB".

160. The Secretary has also expressly linked flexibility in other areas of the NCLB Act with compliance with what she calls the "bright line" of the Act, specifically annual, standardized every grade testing.

161. The Secretary's refusal to permit Connecticut to substitute ongoing formative testing for annual summative testing in grades 3, 5 and 7 is unsupported by significant scientific research, and is arbitrary, capricious and contrary to law. Connecticut's request is supported by over twenty years of success and significant scientific research.

162. The Secretary's insistence that ELL students be tested within one year rather than three years is unsupported by significant scientific research, and is arbitrary, capricious and contrary to law. Connecticut's request and proposed amendment is supported by its years of success and significant scientific research.

163. The Secretary's determination that States that have native language assessments may have three years before assessing ELL students in English, whereas States that have not developed native language assessments must assess ELL students, in English for language arts within one year, and in mathematics immediately, is arbitrary and capricious and contrary to law.

164. Creation, administration and grading of native language assessments in the more than 150 languages used by Connecticut students at home would cost the State millions of additional dollars not provided by the federal government.

165. The Secretary's rigid, arbitrary and capricious interpretation requiring ELL students to be tested within one year rather than three years leaves Connecticut with the harsh dilemma of either spending millions of dollars of State funds to create, administer and grade native language tests in contravention of state law and in violation of the Unfunded Mandates Provision of NCLB, or suffer the series of escalating consequences when its school districts and schools fail to make their AYP because their ELL students cannot understand the English language tests.

166. The Secretary's insistence that special education students cannot be offered the option of being tested at instructional level rather than grade level, regardless of their individualized educational needs, is arbitrary, capricious and contrary to law. Connecticut's request and proposed amendment fits the statutory requirements of reasonable accommodations.

167. The Secretary's rigid, arbitrary and capricious refusal to permit special education students to be tested at instructional level rather than grade level will require Connecticut to incur substantial additional unfunded costs in the amount of $1.5 million per year to create a parallel alternate assessment scheme for a small portion of the special education student population.

168. Because Secretary Spellings contends that the State of Connecticut and its school districts must comply fully with all of the mandates imposed upon them by the

NCLB Act and USDOE's arbitrary interpretation of its requirements, even if the federal funds that they receive are insufficient to pay for such compliance, the State of Connecticut and its school districts have been, and will be, required to spend substantial amounts of non-NCLB funds to comply with the NCLB mandates. Otherwise, the State and its school districts will fall short in their compliance efforts resulting in their schools and school districts being unfairly labeled as schools or school districts that have not made AYP, and the State and its school districts will be required to expend substantial sums to comply with NCLB's progressive sanctions.

169. The Secretary's rigid interpretation of the NCLB Act's every grade testing requirement will compel Connecticut to spend millions of dollars over and above the federal funds provided in order to satisfy the Secretary's rigid view of the every grade testing mandate.

170. In order to meet the required deadline of every grade annual standardized testing by March 2006, the Connecticut Department of Education hired private contractors that developed and piloted the new required tests. The March 2006 NCLB tests were printed and disseminated to all school districts during the third week in February in anticipation of the March 1, 2006 testing period.

171. The federal educational funding allocated to Connecticut fails to meet the costs of complying with all of the NCLB mandates. The State currently is being required to spend state funds to satisfy the Secretary's mandates under the NCLB Act.

172. The federal educational funding allocated to Connecticut for assessments fails to meet the costs of standard state assessments, and thus the State must use its own funds to satisfy the Secretary's mandates under the NCLB Act.

173. Even if the State adopted Deputy Secretary Simon's oral suggestions, the federal education funding allocated to Connecticut for assessments still would fail to cover the assessment costs incurred.

174. The federal educational funding allocated to Connecticut fails to meet the costs of creating, administering and grading alternate assessments for special education students whereas if Connecticut's waiver request or plan amendment regarding special education students had been granted, the federal education funding for special education testing would have been sufficient.

175. The federal educational funding allocated to Connecticut fails to meet the costs of creating, administering and grading assessments in languages other than English for ELL students.

176. The State and its General Assembly have been and continue to be irreparably harmed by the acts and omissions of the Secretary as alleged herein. The State and the General Assembly have suffered a legal wrong and are adversely affected and are aggrieved by such acts and omissions.

177. The State of Connecticut and its General Assembly are harmed by the diversion of non-NCLB funds to NCLB compliance efforts. The State of Connecticut and the General Assembly will be harmed by having Connecticut's schools and school districts unfairly labeled as failing when the federal government has not provided

sufficient funding to comply with all of the NCLB mandates as required by USDOE and the Secretary.

178. The Secretary's rigid interpretations of the NCLB's assessment requirements and arbitrary and capricious refusal to grant reasonable waivers and plan amendments will compel Connecticut to spend millions of dollars over and above the federal funds provided in order to satisfy the NCLB assessment mandates, in direct violation of Conn. Gen. Stat. §10-14n(g) and the Unfunded Mandates Provision of the NCLB Act.

179. No administrative declaratory judgment procedure is available to address the fundamental disagreement between the State and the Secretary regarding the statutory interpretation of the Unfunded Mandates Provision of the NCLB Act.

FIRST CAUSE OF ACTION

[Under the Unfunded Mandates Provision of the NCLB, 20 U.S.C. §7907(a)]

180. The allegations in Paragraphs 1-179 are alleged and incorporated herein by reference.

181. The Unfunded Mandates Provision of the NCLB Act provides that, in complying with the NCLB mandates, States and their school districts cannot be required to "spend any funds or incur any costs not paid for under this chapter." NCLB Act § 9527(a) codified at 20 U.S.C. § 7907(a).

182. The Unfunded Mandates Provision of the NCLB Act provides that no officer or employee of the federal government may mandate, direct or control the allocation of State or local resources.

183. The State and the Secretary disagree about the meaning and statutory interpretation of the Unfunded Mandates Provision of the NCLB Act. The State contends that it cannot be required to spend any funds or incur any costs to comply with the NCLB Act, whereas the Secretary contends that she can require the State to spend its own funds and incur costs to comply with the NCLB Act, notwithstanding the express language of the Act.

184. By requiring the State of Connecticut and its school districts to comply fully with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates even though the federal funds that they receive are insufficient to pay for such compliance and even though the Secretary may waive NCLB mandates, Defendant Secretary Spellings is violating Unfunded Mandates Provision of the NCLB Act.

185. By requiring the State of Connecticut and its school districts to comply fully with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates even if the federal funds that they receive are insufficient to pay for such compliance and even though the Secretary may waive NCLB mandates, Defendant Spellings is violating Unfunded Mandates Provision of the NCLB Act by mandating, directing and/or controlling the allocation of State or local resources.

186. The State seeks a declaratory judgment that the Unfunded Mandates Provision of the NCLB Act means that the State cannot be required to spend any of its funds or incur any costs to comply with the mandates of the Act.

SECOND CAUSE OF ACTION

[Under the Spending Clause of the United States Constitution, Article I, Section 8 and the Tenth Amendment of the United States Constitution]

187. The allegations in Paragraphs 1-186 are alleged and incorporated herein by reference.

188. In enacting the NCLB Act, Congress set forth the conditions under which States and their school districts would be eligible to receive federal funds. One of those conditions is that States and school districts are not required to "spend any funds or incur any costs" not paid for under this Act. 20 U.S.C. § 7907(a).

189. When Connecticut chose to accept the terms and conditions of the NCLB Act, it understood that the Unfunded Mandate Provision meant what it said, namely that the State could not be required to spend any state funds or incur any costs to comply with the Act that were not paid for under the Act. If the Unfunded Mandate Provision does not mean what it says, then Connecticut was misled.

190. By requiring the State of Connecticut and its school districts to comply fully with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates even if the federal funds that they receive are insufficient to pay for such compliance and even though the Secretary may waive NCLB mandates, Defendant Spellings is exceeding her powers under the Spending Clause and violating the Tenth Amendment of the U.S. Constitution by mandating, directing and/or controlling the allocation of State or local resources and coercing the State of Connecticut to take actions that Congress could not otherwise compel it to take.

191. By requiring the State of Connecticut and its school districts to comply fully with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates even if the federal funds that they receive are insufficient to pay for such compliance and even though the Secretary may waive NCLB mandates, Defendant Spellings is exceeding her powers under the Spending Clause and violating the Tenth Amendment of the U.S. Constitution by changing one of the conditions pursuant to which States accepted federal funds under the NCLB – namely, that the State and its school districts would not be required to "spend any funds or incur any costs not paid for" under this Act – thereby precluding the State from exercising its choice to participate in the NCLB Act knowingly, cognizant of the consequences of its participation.

192. The Secretary's penalties for not complying with USDOE's rigid, arbitrary and capricious interpretation of the NCLB mandates are so harsh and unrelated to the conditions upon which the State accepted the funds that they violate the Tenth Amendment.

THIRD CAUSE OF ACTION
[Under the Administrative Procedures Act]

193. The allegations in Paragraphs 1-192 are alleged and incorporated herein by reference.

194. The Secretary's decisions to deny Connecticut its requested waivers constitute final decisions of an administrative agency.

195. The Secretary's decisions regarding waivers are governed by the standards and purposes established by the NCLB Act.

196. The Secretary's decisions to deny Connecticut its requested waivers are unlawful and contrary to constitutional right, power or privilege, are unsupported by the record and violate the Administrative Procedure Act. 5 U.S.C. § 706(2).

197. The Secretary's interpretation of the Unfunded Mandates Provision of the NCLB Act is unlawful and contrary to constitutional right, power or privilege, and her misinterpretation renders her administrative decisions as unlawful and contrary to constitutional right, power or privilege and violate of the Administrative Procedure Act.

198. With respect to Connecticut's alternative-grade formative testing request and requests due to insufficient funding, the Secretary abdicated her statutory obligation to meaningfully consider waiver requests of *any* statutory or regulatory requirement of the NCLB Act by flatly refusing to consider any such waivers.

199. The Secretary's decisions to deny Connecticut its requested waivers are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, privilege or immunity, in excess of statutory jurisdiction, authority or limit, or short of statutory right.

FOURTH CAUSE OF ACTION
[Under the Administrative Procedures Act]

200. The allegations in Paragraphs 1-199 are alleged and incorporated herein by reference.

201. The Secretary's decisions to deny Connecticut its requested plan amendments constitute final decisions of an administrative agency.

202. The Secretary's decisions regarding plan amendments are governed by the standards and purposes established by the NCLB Act.

203. The Secretary's decisions to deny Connecticut its requested plan amendments are unlawful and contrary to constitutional right, power or privilege, are unsupported by the record and violate the Administrative Procedure Act. 5 U.S.C. § 706(2).

204. The Secretary's interpretation of the Unfunded Mandates Provision of the NCLB Act is unlawful and contrary to constitutional right, power or privilege, and her misinterpretation renders her administrative decisions as unlawful and contrary to constitutional right, power or privilege and in violation of the Administrative Procedure Act.

205. In violation of 20 U.S.C. §6311(e)(1)(E), prior to denying the State's plan amendments, the Secretary failed to provide the State with an opportunity to revise its amendments, technical support or a hearing.

206. The Secretary's decisions to deny Connecticut its requested plan amendments are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, privilege or immunity, in excess of statutory jurisdiction, authority or limit, or short of statutory right.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(1) Provide the Plaintiffs with declaratory relief as to the meaning of the Unfunded Mandates Provision;

(2) Issue an order declaring that the Plaintiffs and its school districts are not required to spend State, local or non-NCLB funds to comply with the USDOE's rigid, arbitrary and capricious interpretations of the NCLB mandates;

(3) Issue an order to the Secretary to apply the provisions of the NCLB Act in accordance with the Court's interpretation of the Unfunded Mandates Provision of the NCLB Act;

(4) Issue an order declaring that the Secretary's implementation of the NCLB Act violated the Spending Clause and the 10th Amendment;

(5) Issue an order to the Secretary enjoining her from violating the Spending Clause and the 10th Amendment;

(6) Issue an order to the Secretary requiring her to either grant Connecticut's enumerated waiver requests or provide other adequate relief such that Connecticut is not required to spend its funds or incur costs to comply with the requirements of the NCLB Act;

(7) Issue an order to the Secretary requiring her to either grant Connecticut's enumerated plan amendments or provide other adequate relief such that Connecticut is not required to spend its funds or incur costs to comply with the requirements of the NCLB Act;

(8) Issue an order to the Secretary requiring her to provide a hearing before she denies a plan amendment;

(9) Issue an order to the Secretary directing her that if Connecticut is required to spend its own funds or incurs costs in order to comply with the terms of the NCLB Act, then Connecticut is authorized to make its own educational policy decisions as to how its state funds should be spent to satisfy the mandates of the Act;

(10) Issue an order declaring that a failure to comply with the USDOE's rigid, arbitrary and capricious interpretations of the NCLB mandates due to lack of full federal funding for the NCLB Act does not provide a basis for withholding any federal funds, benefits, approval of State plans or granting of waivers to which the State of Connecticut and its school districts otherwise are entitled under the NCLB Act;

(11) Enjoin Defendant and any other officer or employee of USDOE from mandating, directing or controlling the allocation of State or local resources;

(12) Enjoin Defendant and any other officer or employee of USDOE from withholding from the State of Connecticut and its school districts any federal funds to which they are entitled under the NCLB Act or any other federal statute or regulation because of a failure to comply with any mandate of the NCLB Act that is attributable to Connecticut's refusal to expend its own funds to achieve such compliance and/or the Secretary's rigid, arbitrary and capricious interpretation of assessment requirements;

(13) Enjoin Defendant and any other officer or employee of USDOE from withholding approval of the State of Connecticut's NCLB Accountability Plan, as amended because of a failure to comply with any mandate of the NCLB that is

attributable to Connecticut's refusal to expend its own funds to achieve such compliance and/or the USDOE's rigid, arbitrary and capricious interpretation of assessment requirements;

(14) Enjoin Defendant and any other officer or employee of USDOE from denying a waiver of the requirements of the NCLB (including, but not limited to, special education testing) to the State of Connecticut's plans because of a failure to comply with any mandate of the NCLB that is attributable to Connecticut's refusal to expend its own funds to achieve such compliance and/or the USDOE's rigid, arbitrary and capricious interpretation of assessment requirements;

(15) Enjoin Defendant and any other officer or employee of USDOE from taking any adverse action against the State of Connecticut because of a failure to comply with any mandate of the NCLB that is attributable to Connecticut's refusal to expend its own funds to achieve such compliance and/or the USDOE's rigid, arbitrary and capricious interpretation of assessment requirements;

(16) Award to the Plaintiffs, pursuant to 28 U.S.C. § 2412 and any other applicable statute, the costs, fees, and other expenses incurred in prosecuting this lawsuit; and

(17) Order such other and further relief as this Court may deem appropriate.

PLAINTIFFS
THE STATE OF CONNECTICUT
and the GENERAL ASSEMBLY OF
THE STATE OF CONNECTICUT

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CERTIFICATION

I hereby certify that on August 1, 2006, a true and accurate copy of the foregoing Second Amended Complaint was filed electronically and served by mail on anyone unable to accept electronic filing, including Olf and Bally Veldhuis, 160 Mill Road, New Canaan, CT 06840. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of electronic Filing. Parties access this filing through the court's CM/ECF System. I further certify that pursuant to the Court's standing order, a courtesy copy of the Second Amended Complaint was provided to chambers by overnight mail.

/s/ Clare E. Kindall
Clare E. Kindall
Assistant Attorney General